BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **DRESSER/AREIA CONSTRUCTION, INC.** DRESSER AREIA CONSTRUCTION, INC. 4447 Stoneridge Drive, Suite 2 Pleasanton, CA 94588 Employer	DOCKETS 96-R2D1-2034 and 2035 **DECISION**

Background and Jurisdictional Information

On June 21, 1996, the Division of Occupational Safety and Health (the Division), through Joel Halverson, Associate Safety Engineer, conducted a complaint inspection at a place of employment maintained by Employer at 515 P Street, Sacramento, California (the site). On July 9, 1996, the Division issued Employer Citation 1 alleging a regulatory violation of § 341.1(f)(3) [failure to notify Division before commencing excavation work] of occupational safety orders and health standards found in Title 8, California Code of Regulations[1]. The Division also issued Citation 2, alleging a serious violation of § 1592(b) [inoperable back-up alarm]. A civil penalty of $500 was proposed for each violation.

Employer filed timely appeals contesting the existence and classification of the violations and the reasonableness of the abatement requirements and proposed civil penalty.

This matter came on regularly for hearing before Dennis M. Sullivan, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California, on March 5, 1997, at 1 p.m. Frank Kielian, Safety Consultant, represented Employer. Joel Halverson, Associate Safety Engineer, represented the Division. Oral and documentary evidence was introduced by the parties and the matter was submitted on March 5, 1997.

Docket 96-R2D1-2034

Citation 1
Regulatory
§ 341.1(f)(3)

[1] Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

Summary of Evidence

On June 21, 1996, Employer, a contractor who performs underground work, was laying an electrical conduit in a trench cut in the 500 block of P Street, when Associate Engineer Halverson arrived to inspect.

Mr. Halverson testified that he observed workers in the open, adequately shored trench and measured its depth at one point as 8 feet 2 inches. Foreman Frank Palomo and Superintendent Butch Ellis informed him that the work was being done by Employer and that the workers in the trench were employees.

Mr. Halverson did not see a copy of the notice Employer was supposed to have sent to the Division before commencing to excavate or an annual excavation permit posted at the site. When he asked the foreman and superintendent for those documents they could not find them.

Upon returning to the Division's Sacramento district office, Mr. Halverson checked the drawer in which were the Division keeps notices of intent to excavate received from employers and found none from Employer concerning this or any other project. He then checked the office log of telephonic communications and found no entries relating to Employer.

Mr. Halverson also called the Division's San Francisco and Concord district offices. He learned that Employer had a current annual excavation permit but neither of the other offices had any record of notification by Employer of intent to commence the P Street project.

Finally, he noted that, throughout the investigation and prehearing stages of the case, Employer had been unable to produce a copy of the notification or records tending to prove the Division had been notified by any means.

Based on Mr. Halverson's inspection, the Division issued Citation 1 alleging a violation of § 341.1(f)(3). He testified that the violation was classified as regulatory because it concerned a reporting requirement and had been abated by Employer.

Using the proposed penalty worksheet (Division Exhibit 2) as a guide, Halverson explained how the $500 proposed civil penalty had been calculated in accordance with the Director's penalty setting regulations.

Daniel Dresser, Employer's Vice President, testified that, when Employer is awarded a bid, a package of materials is provided to the designated project manager, in this case, Manuel Fields. The first document in the package is a form entitled "Job Info Sheet & Checklist" that includes "OSHA Notification Form" as one of the checklist items. Manuel Fields told Mr. Dresser that he notified the Division before starting the project.

Manuel Fields no longer works for Employer and was not a witness at the hearing. Mr. Dresser searched Employer's files and phone records for documents or entries confirming Fields's assertion that he had notified the Division, but found none.

Mr. Dresser also testified that, as an underground contractor, Employer is fully aware of Cal/OSHA permit and notification requirements and has consistently complied with them. He added that Employer did an excavation project on Fruitridge Road in Sacramento in 1995. He felt sure Employer had notified the Sacramento District Office in writing before starting that project. It too was inspected by Cal/OSHA and Employer was not cited for failing to notify the Division.

Frank Kielian, Safety Consultant, testified that Employer had been a client for several years. Periodically, Kielian reviews Employer's safety practices and procedures and inspects worksites to ensure compliance with applicable safety orders.

In the course of this relationship, Mr. Kielian had found that Employer was very careful about complying with permit and notification requirements.

He inspected the 1995 Fruitridge Road project, and recalled seeing, at Employer's office, a completed copy of a notice an office employee said he had sent to the Division. His findings concerning notification at other of Employer's projects had been the same.

Findings and Reasons for Decision

THE TRENCH AT THE SITE WAS MORE THAN 5 FEET DEEP. EMPLOYEES ENTERED THE TRENCH TO WORK. THE DIVISION DISTRICT OFFICE NEAREST THE PROJECT SITE WAS THE SACRAMENTO DISTRICT OFFICE. EMPLOYER FAILED TO NOTIFY THE SACRAMENTO DISTRICT OFFICE BEFORE COMMENCING THE PROJECT. A VIOLATION OF § 341.1(f)(3) WAS ESTABLISHED.

THE ABATEMENT REQUIREMENTS WERE REASONABLE.

THE $500 PROPOSED CIVIL PENALTY IS REASONABLE.

§ 341(a)(1) lists the, "[C]onstruction of trenches or excavations which are 5 feet or deeper and into which a person is required to descend," as one of 4 types of employment for which permits are required because, by their nature, they "involve substantial risk of injury."

§ 341.1(f)(1)(B) provides that an employer may obtain an annual permit to construct excavations or trenches, "even though the work may be performed at different locations."

For annual excavation permit holders, § 341.1(f)(3) adds the requirement that "the employer shall notify the District Office nearest the proposed work project prior to the commencement of any work activity" and specifies that, "the notification shall be made by telegram, letter, or a telephone call, to be confirmed by a telegram or letter, indicating the location of the project and the date and time the work activity is to commence."

Division inspector Halverson testified that he measured the depth of the trench at one point as 8 feet 2 inches deep and that workers, identified to him by employer's foreman and job superintendent as employees of Employer, were working in it.

Based on Halverson's unrefuted testimony that the trench was 5 feet or more in depth and that employees were working in it, it is found that the § 341.1(f) duty to notify the nearest district office before starting the project applied.

It was undisputed that the trench was in P Street, in the city of Sacramento. Hence, it is found that the Division's nearest district office was the Sacramento district office.

Halverson testified, without refutation, that he asked the foreman and site superintendent for a copy of Employer's annual excavation permit and proof that the Sacramento district office had been notified and that they looked, but could find neither at the site. He also testified that he searched the District's records and found no evidence of telephonic or written notification from Employer.

Mr. Dresser, Employer's Vice President, testified that Project Manager Manual Fields told him the notification had been sent. Mr. Fields's statement was hearsay evidence, and Mr. Dresser acknowledged that when he searched Employer's records for corroborative evidence, he found none.

It was clear, from the testimony of Mr. Dresser and Mr. Kielian, that Employer makes a conscientious, systematic effort to comply with the notification requirement in all instances, and, their convincing and consistent testimony tending to prove that Employer had properly notified the Sacramento office regarding the 1995 Fruitridge Road project casts some doubt on the accuracy of the Division's Sacramento office records. However, other considerable evidence supports the Division's contention that there was no notification in this instance.

Safety Engineer Halverson's testimony that he made a careful, thorough search of the District office records and even contacted other nearby district

offices to see if Employer notified the wrong office was also very credible. He searched the Division's records a few weeks after the notification should have been sent and was looking specifically for a notification pertaining to the P Street project. He knew exactly where to look, and should have been able to find it if it was in the drawer. He may have skipped over a notice from Employer relating to the earlier project because it did not describe a project on P Street.

Mr. Halverson's testimony that he found no record of telephonic or written notice from Employer is bolstered by his unrefuted testimony that the field superintendent and project foreman had neither a copy of the notification or the annual excavation permit available at the site.

Pursuant to § 341.4, a copy of an employer's annual permit must be posted or available at each excavation site. The failure of project Manager Fields to comply with that permit requirement suggests that he was not paying close attention to the permit and notification requirements on this project.

Moreover, Mr. Dresser and Mr. Kielian testified that it was Employer's practice to retain copies of the written notifications it sent to the Division, but Mr. Dresser's search of Employer's records yielded the same result as Mr. Halverson's search of the Division's records; he found nothing to indicate notification had been made.

It is found that a preponderance of the evidence presented on this point supports the Division's contention that Employer failed to notify the Division of its intent to excavate a trench in P Street before starting the project. Accordingly, it is found that Employer violated § 341.1(f)(3).

The violation "... pertains to permit ... and reporting requirements ... established by regulation or statute." Thus, it is within the § 334(a) definition of a "regulatory violation" and was so classified properly.

By way of abatement, the Division sought only compliance with the notification requirement and Employer abated the violation. The abatement requirements are found to be reasonable.

Inspector Halverson's unrefuted testimony and the proposed penalty worksheet (Division Exhibit 2) proved that the $500 proposed civil penalty was calculated in accordance with the Director's regulations. It is found that the penalty is reasonable.

Docket 96-R2D1-2035

Citation 2
Serious
§ 1592(b)

Summary of Evidence

Assistant Safety Engineer Karen Antonson was a Safety Engineering Technician when the inspection was conducted on June 21, 1996. She went to the site with Associate Safety Engineer Halverson to observe, learn, and assist.

Ms. Antonson testified that she saw a loader moving forward and backward along one side of the trench, within 10 feet of employees. She observed the loader in operation for some time from approximately 20 feet away. She could see a back-up alarm on the loader and reported this to Mr. Halverson, who was talking with the foreman and field superintendent. They had the operator shift the loader into reverse gear. The alarm should have sounded, but it did not.

When using the loader bucket to scoop up and dump earth and other materials the operator sat in a cab between the front wheels, facing the bucket. The engine and radiator compartment were to the operator's rear. Ms. Antonson stood directly behind the loader and found that the engine compartment was taller than she. In her opinion, the high engine compartment could have prevented the operator from seeing an employee within 3 or 4 behind the loader, even if the employee were standing.

Ms. Antonson also testified that the workers she observed near the loader were sweeping the street and arranging shoring by the edge of the trench. She did not record the names of any of the workers she observed but said the project foreman identified them as employees of Employer.

Safety Engineer Halverson testified that he observed the foreman and workers moving shoring and cleaning up asphalt and gravel along the street side of the trench while the loader was being operated there.

When Ms. Antonson told him she could not hear the back-up alarm sound Mr. Halverson and the foreman had the operator start the machine and put it in reverse gear. If the back-up alarm were operable it would have sounded when that was done, but the alarm did not sound.

Mr. Halverson is approximately 6 feet 3 inches tall. He also stood behind the loader to determine the extent to which the engine compartment obstructed the operator's vision to the rear, and found the top engine compartment to be approximately level with the top of his head.

The loader was a Fiatallis model FR9B. Mr. Halverson contacted a dealer who informed him that the FR9B bucket had a maximum capacity of 2 cubic yards. At Halverson's request, the dealer also measured the height of the rear end of the engine compartment of an FR9B and advised Halverson that it was 74 to 75 inches high.

From what Ms. Antonson told him and his own observations, Mr. Halverson determined that Employer was using no alternate means, e.g., a signalman, to warn employees behind the loader of backward movement.

For these reasons, the Division issued Citation 2 alleging a violation of § 1592(b).

Regarding the serious classification of the violation, Mr. Halverson testified that the foremen was working near the loader when he and Ms. Antonson arrived, and he estimated that he and Ms. Antonson had been at the site for at least an hour before she informed him she could not hear the alarm. This indicated to Mr. Halverson that Employer knew or should have known of the violation before it was brought to his attention. In his experience, when a heavy piece of earth moving equipment, like the loader, backed over an employee, death or serious physical harm almost always resulted. For these reasons, the violation was classified as serious.

Under cross examination, Mr. Halverson acknowledged that he did not enter the operators cab to check visibility to the rear from that vantage point. He also testified that he did not record the names of the workers he saw around the loader. He thought one of the workers was named Frank James. He added that he observed them putting in shoring and cleaning up around the trench, work related to Employer's project, and that Employer's foreman told him they were employees. As he recalled, at times, the loader was "right next to employees."

Crew Foreman Frank Palomo testified that he was working at the site during the inspection. As he recalled, the Division's inspectors arrived at approximately 9:30 a.m.

At that time of the morning, work is just getting under way. Each morning, before any work was done in the excavation, preparatory steps had to be taken. First, the loader and other vehicular equipment was fueled. Next traffic cones were set out in the street around the construction area. Then the loader was used to pull the steel traffic (cover) plates off the trench.

When the inspectors arrived, the loader was being used to pull the plates off the trench. Mr. Palomo said that he had heard the back-up alarm the day before the inspection and earlier that morning before the inspectors arrived.

According to Mr. Palomo, shortly before the inspection, the loader operator told him the back-alarm was beginning to "gurgle". Mr. Palomo also testified that, approximately 5 minutes before the back-up alarm was tested at Mr. Halverson's request, the loader operator informed him that the alarm had stopped working. He added that he took the loader out of service and sent for a mechanic as soon as the operator told him of the problem.

According to Mr. Palomo, when Mr. Halverson spoke to him about the alarm and asked that it be tested, Mr. Palomo told him that he was already aware of the problem, but had the operator test the alarm anyway, and it did not sound.

Mr. Palomo identified Employer Exhibit B as an illustration of a Model FR9B Loader, and said that was the type of loader Employer was using at the site. It was his understanding that the bucket had a 2 cubic yard capacity. He opened the engine compartment daily to add fuel and water, and estimated the top of the compartment to be approximately chest high.

In rebuttal, Mr. Halverson testified that the operator did not stop using the loader until he hand signaled the operator and asked him to stop, right after Ms. Antonson told him she couldn't hear the alarm. He also testified that after the back-up alarm test, he saw the superintendent make a call on his car phone and that the superintendent then informed him that a mechanic had been dispatched to the site to fix the back-up alarm.

Daniel Dresser, Employer's vice president, testified that Employer Exhibit B is a copy of the cover of the owner's manual for a Fiatallis model FR9B loader. He pointed out that there are large windows all around the cab and that the cover describes one of the FR9B's "operator efficiency" features as the "large glass area" that provides "maximum visibility in all directions." He added that this is one of the safety features which caused Employer to purchase the FR9B.

The field superintendent, the crew foreman and the loader operator all told Mr. Dresser that the back-up alarm had been working that morning prior to the inspection.

Findings and Reasons for Decision

THE LOADER WAS AN EARTH MOVING VEHICLE WITH A HAULAGE CAPACITY OF 2 CUBIC YARDS.

ON JUNE 21, 1996, FOR SOME PERIOD OF TIME, THE LOADER'S AUTOMATIC BACK-UP ALARM DID NOT SOUND WHEN THE LOADER BACKED-UP.

NO ALTERNATE MEANS OF WARNING EMPLOYEES ON FOOT IN THE AREA OF BACKWARD MOVEMENT OF THE LOADER WERE USED.

EMPLOYEES WERE WORKING ON FOOT LESS THAN 10 FEET FROM THE LOADER WHILE IT WAS IN OPERATION.

THE ENGINE COMPARTMENT WAS HIGH ENOUGH TO OBSTRUCT THE OPERATOR'S VISION TO THE REAR.

A VIOLATION OF § 1592(b) WAS ESTABLISHED.

EMPLOYER DID NOT KNOW THE ALARM WAS NOT FUNCTIONING AND HAD NO REASONABLE OPPORTUNITY TO DETECT THE VIOLATION BEFORE IT WAS OBSERVED BY THE DIVISION'S INSPECTORS. CLASSIFICATION OF THE VIOLATION IS REDUCED TO GENERAL.

THE $500 PROPOSED CIVIL PENALTY IS UNREASONABLE FOR A GENERAL VIOLATION. IT IS REDUCED TO $150.

THE ABATEMENT REQUIREMENT OF REPAIRING THE BACK-UP ALARM WAS REASONABLE.

§ 1592(b) applies to earth moving vehicles with a haulage capacity of less than 2½ cubic yards that are, "operated in areas where their backward movement would constitute a hazard to employees working in the area on foot, and where the operators vision is obstructed to rear of the vehicle ...." Subject vehicles must be equipped either with an automatic back-up audible alarm or an automatic braking device. In lieu of these devices, an employer may warn employees by implementing effective administrative controls such as, "prohibiting all foot traffic in the work area."

The Division inspector and Employer's foreman both testified that they had been informed that the haulage or bucket capacity of the loader was 2 cubic yards. The cover of the owner's manual (Employer Exhibit B) states that the bucket capacity is 2 cubic yards. On this evidence, it is found that the loader had a haulage capacity of less than 2½ cubic yards and, therefore, was subject to § 1592(b).

The safety engineer and safety technician testified that they saw workers sweeping and shoveling up asphalt and arranging shoring on the same side of the trench the loader was being operated

Employer questioned whether the Division's identification of the people working near the loader as employees of Employer was sufficient. The foreman testified that it was Employer's policy to keep employees on foot from working on the side of a trench closest to traffic when ever possible. It was also undisputed that there was a SMUD inspector at the site and one or more non-employee truck drivers delivering or hauling away asphalt, gravel and other materials.

Even though others were present at the site, the workers observed by the Division representatives were using brooms, shovels and shoring to perform work directly related to Employer's underground conduit laying project. And, both

Division witnesses testified that Employer's foreman told them that the workers so engaged were employees of Employer.

For the above reasons, it is found that the workers the Division inspectors saw near the loader were employees of Employer.

The safety technician testified that she saw employees within approximately 10 feet of the loader and the safety engineer testified that, at times, the loader was right next to employees. Employer presented no directly conflicting testimony. The testimony of the Division's witnesses is credited, and, thereupon, it is found that Employer was operating the loader in an area where employees on foot could have been injured by backward movement of the loader.

The Division's safety engineer and safety technician both testified that they stood behind the loader for the purpose of determining the extent to which the engine compartment blocked the operator's view of the ground directly behind the loader. Their testimony was consistent. Ms. Antonson, who is shorter than Mr. Halverson, said the top of the compartment was above her head. Both of them indicated that the top of the compartment was approximately level with the top of the safety engineer's head, and he testified that he was (and he appeared to be) approximately 6' 2" tall. His hearsay testimony that an equipment dealer measured the height of the engine compartment on another FR9B loader as 74 to 75 inches supplements their direct testimony.

Foreman Palomo's testimony that he could open and look into the engine compartment at, approximately, the height of his chest does not carry the same evidentiary weight. From his description and gestures, it was unclear whether he was estimating the height of the handles he gripped to open the engine compartment, which are on the sides of the compartment below the top (Employer Exhibit B), or the top of the compartment.

A preponderance of the evidence presented on this point supports the Division's contention that the top of the engine compartment was approximately 6 feet 2 inches above ground, and it is so found.

The side view photograph of a FR9B loader on the cover of the Owner's Manual (Employer Exhibit B) shows that the engine compartment extends beyond the rear wheels, creating a substantial blind spot for the operator immediately to the rear, despite his elevated location and the large windows. It shows, for example, that an employee of average height, standing close to the rear of the loader would not be visible to the operator, as Ms. Antonson found when she stood there. Furthermore, employees do not always stand upright and the safety order is intended to protect those who must squat, kneel or sit as well. Accordingly, it is found that the operator's view was obstructed to the rear.

The safety engineer's unrefuted testimony established that there was no automatic braking device at the rear of the loader and that Employer was not

using administrative controls or any other means to protect employees against the hazard of backward movement of the loader.

For the foregoing reasons, it is found that the Division proved a violation of § 1592(b).

For a violation to be classified as serious, it must be shown that the violation could, to a substantial probability, result in serious physical harm or death to an employee and that the employer either knew of the violation or could have detected it by exercising reasonable diligence. (Labor Code § 6432(a))

The cover of the Owner's Manual (Employer Exhibit B) says that an FR9B loader has an operating weight of 16,690 pounds. The safety engineer testified, without refutation, that in his experience, employees run over by such heavy vehicles suffer serious physical harm or death more often than not.

That evidence proved there is a substantial probability the violation could result in serious physical harm or death and, thus, established the first element of a serious violation.

With respect to employer knowledge, however, the Division's evidence falls short.

Employer's foreman testified that the inspectors arrived at approximately 9:30 a.m. while the day's work was still in its preparatory stages. He said the loader was then being used to pull the traffic plates off the open portion of the trench, and neither of the Division's witnesses disputed this.

He also testified that alarm had been working until sometime shortly before or during the inspection and the inspectors testified that they had not determined when the alarm stopped working. On this point, the foreman's testimony and the supplementing hearsay statements of the loader operator and superintendent, to which Mr. Dresser testified, are credited. Accordingly, it is found that the alarm stopped working either shortly before or during the inspection.

The inspectors testified, generally, that the foreman was near the loader when they arrived, without specifying or estimating the distance, describing the ambient noise and whether or not he was engaged in work that may have prevented him from paying attention to the alarm. From this limited evidence, it cannot be inferred that the foreman knew of the violation.

Once the inspectors arrived, the foreman was occupied with the opening conference, Mr. Halverson's inquiry into permit, notification and other matters, and the inspection of the site itself. While the foreman was cooperating in the inspection, he did not have a reasonable opportunity to detect the violation.

Mr. Halverson's and Ms. Antonson's testimony as to how and when the loader stopped operating is credited. The foreman's uncorroborated, conflicting testimony is rejected. He and the superintendent were with Mr. Halverson, participating in the inspection, at the time the foreman claimed the loader operator told him the alarm was gone and he took the loader out of service. If the loader operator or foreman had so informed Mr. Halverson, Ms. Antonson, who was standing a short distance away, would have known that had been done, and it would have been unnecessary for her to bring the alarm to Mr. Halverson's attention. However, the foreman's self-serving testimony regarding events that allegedly occurred after the inspection started is not proof that he knew of the violation before the inspection or that the alarm was inoperable long enough before the inspection for Employer to have had a reasonable opportunity to detect the problem.

Under these peculiar facts, it is found that the Division failed to prove Employer knew of the violation or had a reasonable opportunity to detect it. Accordingly, classification of the violation must be reduced to general.

Since the $500 civil penalty was proposed on the assumption that the violation was serious, it is unreasonable now that the violation has been reduced to general. The civil penalty is reduced to $150, an amount deemed reasonable, and assessed.

To abate the violation, the Division sought only compliance with the safety order. No less could be asked. Employer's foreman testified that a mechanic came to the site and fixed the back-up alarm right after the inspection. It is found that the abatement requirements are reasonable.

Decision

Docket 96-R2D1-2034

The appeal is denied. A regulatory violation of § 341.1(f)(3) is established against Employer and a $500 civil penalty is assessed, as set forth in the attached Summary Table.

Docket 96-R2D1-2035

The appeal is granted to the extent of reducing the classification of the violation to general and the civil penalty to $150, as set forth in the attached Summary Table.

Dated: April, 1997

DENNIS M. SULLIVAN

Administrative Law Judge

DMS:cdh